



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Njoki, Lenaola & Ouko, SCJJ)

PETITION (APPLICATION) NO. E022 OF 2024

– BETWEEN –

KENYA WILDLIFE SERVICE APPELLANT

– AND –

SEA STAR MALINDI LIMITED RESPONDENT

(Being an application to strike out the appeal & record of appeal both dated 24th May 2024 and supplementary record of appeal dated 6th June 2024, and an application for stay of execution of the judgment and order of the Court of Appeal in Malindi Civil Appeal No. E018 of 2022 Kenya Wildlife Service vs Sea Star Malindi Limited)

Representation

Mr. Kiragu Kimani, SC for the Appellant
(Hamilton Harrison & Mathews Advocates)

Mr. Kevin Anami and Mrs. Jacqueline Okune for the Respondent
(Konan & Associates Advocates)

RULING OF THE COURT

[1] BEFORE THIS COURT are two applications filed by both parties. Though brought separately, they are intertwined and to make good use of judicial time, we shall proceed to dispose of both of them in this ruling.

[2] UPON CONSIDERING the respondent's Notice of Motion dated 28th June 2024 filed under Sections 3A and 20(1) of the Supreme Court Act, Cap 9B, Rules 3(5) and 13(1) of the Supreme Court Rules, 2020 where it seeks to have the Appeal, Record of Appeal, both dated 24th May 2024 and the Supplementary Record of Appeal dated 6th June 2024 struck out for failing to meet this Court's jurisdictional threshold, being incomplete and filed out of time; and

[3] UPON FURTHER CONSIDERING the grounds in support of the application and the supporting affidavit sworn by Michele Marchioro on even date and submissions of similar date and further submissions dated 18th July 2024 to the effect that the issue before the superior courts below did not deal with the interpretation or application of the Constitution and therefore falls afoul the jurisdictional threshold set out in Article 163(4)(a) of the Constitution and elaborated in *Lawrence Nduttu & 6000 Others vs Kenya Breweries Limited & Another*, SC Petition No. 3 of 2012; [2012] eKLR; therefore the appeal can only fall under Article 163(4)(b) of the Constitution but the appellant did not seek, obtain or attach proof of such certification that the appeal raises a matter of general public importance; in addition, in line with this Court's decision in the case of *Gilbert Mwangi Njuguna vs Judicial Service Commission & Attorney General*, SC Petition No. 10 of 2019; [2020] KESC 52 (KLR), while the appellant filed the Notice of Appeal on 25th April 2024, it filed its Record of Appeal on 3rd June 2024 outside the statutory timelines rendering them a nullity; and

[4] BEARING IN MIND the appellant's replying affidavit sworn by Benta Musima, its Acting. Corporation Secretary, on 12th July 2024, submissions of even date and further submissions dated 18th July 2024 to the effect that the issue before

the Court of Appeal involved the interpretation and application of the Constitution and the Court of Appeal's decision took a trajectory of constitutional interpretation or application, that is, whether the appellant violated the respondent's right to property and the remedy(ies) available thereof; that the Appeal therefore invokes and meets the appellate jurisdiction threshold set out in Article 163(4)(a) of the Constitution; that in the circumstances this Court has jurisdiction to hear and determine the appeal; that further, the Appeal, Record of Appeal and Supplementary Record of Appeal were filed on time; and

[5] TAKING INTO ACCOUNT the appellant's Notice of Motion dated 16th July 2024 and brought under Section 23(1)(a) of the Supreme Court Act and Rule 31 of the Supreme Court Rules seeking a stay of execution of the judgment and orders of the Court of Appeal in *Malindi Civil Appeal No. E018 of 2022 Kenya Wildlife Service vs Sea Star Malindi Limited*; and

[6] FURTHER TAKING INTO ACCOUNT the grounds on the face of the application, the supporting affidavit sworn on 16th July 2024 by Benta Musima, the submissions dated 25th July 2024 and further submissions dated 22nd August 2024 to the effect that the appellant had met the threshold for issuance of orders of stay of execution as set out in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others*, [2014] eKLR, that is, the appeal is arguable with a high chance of success, if stay is not granted, the appeal will be rendered nugatory because the decretal sum of Kshs.421,179,039.15/= is colossal, and executing for the said amount would cripple the appellant's business which had become overwhelming over time owing to increased human-wildlife conflict; that moreover, being a State institution funded from taxpayers' funds or donor funds, public interest tilts in favour of granting stay of execution since executing the decree would negatively affect Kenya's wildlife conservation efforts; that, the budgetary allocations are not enough to meet its resource requirements and it has to rely on donor support for the deficit; that further, the application is not

premature since execution is a risk given that the appellant does not enjoy the immunity afforded by the Government Proceedings Act; that the respondent is unlikely to refund the sums owing as its means are unknown; and

[7] BEARING IN MIND the respondent's grounds of opposition dated 16th August 2024, replying affidavit sworn by Michele Marchioro on 16th August 2024 and submissions dated 19th August 2024 contending that the application does not meet the test set out in the *Gatirau Peter Munya Case (Supra)*; that the application is premature since there is a pending application to strike out the Appeal, Record and Supplementary Record of Appeal, and the execution process is the subject of Judicial Review under the Government Proceedings Act which process has not been commenced; that in addition, the appellant did not serve the subject application on 7th August 2024 as per the Court's directions; that the application is *mala fides* because the appellant has had over 26 years to make good the claim and mitigate their exposure but instead, continues to rely on protecting national resources at the respondent's expense; that in any event, the decretal sum is yet to be ascertained through a decree to be issued by the Deputy Registrar, Court of Appeal; that, in any event, the appellant is acting in bad faith since the parties were in negotiations on how to settle the decretal sum only for the appellant to file the present application; that, lastly, the appellant has not offered any security for the payments; and

[8] HAVING CONSIDERED the totality of the applications, the responses and submissions put forth, **WE NOW OPINE** as follows:

- a. For good order, we shall begin with the respondent's application dated 28th June 2024.
- b. **Rule 38(1) of the Supreme Court Rules** provides that an appeal shall be lodged with this Court within 30 days of filing the notice of appeal, where the appeal is as of right. **Rule 12 of the Supreme Court Rules** on its part provides that documents shall be filed in

both printed and electronic form. In the instant case, the appellant filed the Appeal and Record of Appeal electronically on 24th May 2024 which was within the 30-day statutory timeline, but submitted printed copies on 10th June 2024. Going by our decision in ***Kenya Hotel Properties Limited vs Attorney General & 5 Others***, (Application 2 (E004) of 2021; [2021] KESC 49 KLR, where we held that filing is complete once the electronic and printed copies are filed, in this case, filing of the Appeal, Record of Appeal was completed on 10th June 2024. Therefore, filing was completed approximately 15 days out of time.

- c. In ***Kenya Airports Authority vs Otieno, Ragot & Company Advocates***, SC Petition (Application) No. E011 of 2023; [2023] KESC 104 (KLR), we reiterated that court orders and directions on filing and service of documents should be followed. That said, this Court can exercise its power under Section 21 of the Supreme Court Act and Rule 65 of the Supreme Court Rules and issue such orders or directions as would regularize the case bearing in mind that this Court has an obligation to ensure parties reasonably access justice.
- d. In our view, the delay of 15 days cannot be said to be inordinate and the respondent has not established what prejudice it stands to suffer or has suffered. In the circumstances, and in the interests of justice, we invoke our powers under Section 21 of the Supreme Court Act and Rule 65 of the Supreme Court Rules and order that the Appeal, Record and Supplementary Record of Appeal be admitted and deemed to have been filed within time.
- e. On the question of jurisdiction, we note that the appellant has invoked this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution. The appellant alleges that the trajectory of the Court of Appeal's decision ushers in the interpretation and application of the

Constitution. The respondent, on the other hand, posits that the matter as presented before the superior courts below, did not substantively deal with the constitutional interpretation or application. Therefore, according to the respondent, the appeal can only be brought under Article 163(4)(b) of the Constitution which is a matter of general public importance, for which, the appellant had not sought certification.

- f. According to the record of appeal, the respondent's further re-amended plaint dated 27th March 2006 and appellant's defence dated 3rd November 1998, the respondent was the registered proprietor of land parcel L.R. No. 3170. On or around 9th November 1997, the appellant caused armed wardens to take physical possession of a portion the land under construction, stop the ongoing construction of a hotel and to keep guard thereon. This was premised on the allegation that the portion under construction encroached on a statutorily protected area in line with Legal Notice No. 99 of 1968 that designated a-100ft from the highest watermark on the land adjoining the Indian Ocean as a protected zone under the Wildlife Conservation and Management Act Cap 376 of the Laws of Kenya, and hence an exclusive Government zone under the appellant's jurisdiction. Subsequently, by ***Sea Star Malindi Limited vs Kenya Wildlife Services & 2 Others***, High Court Miscellaneous Civil Suit No. 982 of 1997; [2002] eKLR, the Court (*Onyango, J. (as he then was)*) (*Judicial Review Case*) held that the suit land extended to the high-water mark and as such, the 100 feet area did not exist and so, Legal Notice No. 99 of 1968 did not apply to it. For that reason, the Court held that the appellant acted ultra vires and interfered with the respondent's enjoyment of its property and violated Section 75 of the Constitution. In *Sea Star Malindi Limited vs Kenya Wildlife Services*

& Another Malindi ELC Case No. 6 of 2016 (ELC), the ELC relied on this decision that was delivered during the pendency of its proceedings and held that it settled the question of liability. Consequently, the ELC proceeded to determine the issue of damages which it awarded as follows: Kshs.90,000,000/= for the reconstruction of the hotel, and Kshs.30,000,000/= as general damages.

- g. By a majority judgment delivered on 12th April 2024, the Court of Appeal in *Civil Appeal No. E018 of 2022*, the Court (*Nyamweya, Gatembu, Odunga JJA.*) delineated several issues for determination. To our minds, the crux of the matter before the Court of Appeal was whether the ELC erred in relying on the *Judicial Review case* and extrapolating its determination on liability to the suit before it. That said, we take cognizance of various issues. First, the *Judicial Review case* held that the appellant's acts violated Section 75 of the Constitution. The ELC relied wholly on this exposition and held that it settled the question of liability. Secondly, the Court of Appeal acknowledged the *Judicial Review case* decision to the effect that the appellant's acts violated the respondent's constitutional right and also constituted a tort. It went further to speak to damages as a proper remedy for constitutional violations under Article 23(3) (e) of the Constitution and the applicable principles.
- h. Having held as above, we find that indeed, the suit took a trajectory of constitutional interpretation and application. Therefore, the appellant has properly invoked this Court's jurisdiction under Article 163(4)(a) of the Constitution.
- i. Concerning the appellant's application for stay of execution, Section 23A of the Supreme Court Act vests this Court with the requisite jurisdiction to grant the said orders. The test for grant of stay of

execution was set out in the case of ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (Supra)*** as follows: *the appeal or intended appeal is arguable and not frivolous, unless stay is granted, the appeal or intended appeal will be rendered nugatory should it eventually succeed, and it is in the public interest that stay be granted.*

- j. The gist of the appeal, as we understand it, is whether the Court of Appeal erred in relying on and adopting the rationale in the *Judicial Review case* in ascribing liability to the appellant; awarding the respondent Kshs.3,000,000/= as compensation for violation of its rights; and, affirming the ELC's award of Kshs.90,000,000/= as compensation for the reconstruction of the respondent's hotel. Without delving into the merits of the appeal, we find that the foregoing issue warrants this Court's consideration. Therefore, we find that the appeal is arguable.
- k. While no evidence has been placed before the Court that the decretal sum is well over Kshs.400,000,000/=, we acknowledge that the sum of Kshs.93,000,000/= together with interest is in itself a colossal sum from a public body without the attendant comfort that it can be recovered if found not due to the respondent. Further, as the dispute involves a statutory body funded by public coffers as rightly advanced by the appellant to which any monies paid out are subject to budgetary allocation. Being a public body, it is not necessary to offer security and in particular of such an amount, as to itself be an impediment to access to justice as we held in ***Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR)*** . To that extent therefore, we find that the application for stay has met the 3-prong test.

1. However, we take cognisance of the period this matter has been in the court system, that is from 15th August 1998. To ensure that justice is dispensed expeditiously, we deem this matter fit to be heard on priority basis.

[9] In line with our decision in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others***, SC Petition Application No. 4 of 2012; [2014] eKLR, we order that the costs shall abide the outcome of the appeal.

ORDERS

[10] **Consequently**, and for the reasons aforesaid, we make the following orders:

- a) The application dated 28th June 2024 is dismissed.***
- b) The application dated 16th July 2024 is allowed.***
- c) The appeal dated 24th May 2024 be heard on priority basis.***
- d) The costs shall abide the outcome of the appeal.***

Orders accordingly.

DATED and DELIVERED at NAIROBI this 20th day of December 2024.

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M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT

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P.M. MWILU
DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE
SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

